

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
Rules and Regulations)	CC Docket No. 02-278
Implementing the Telephone)	
Consumer Protection Act)	
of 1991)	
_____)	

**REPLY COMMENTS OF ROBERT BIGGERSTAFF ON THE PETITION OF
SOUNDBITE COMMUNICATIONS**

Robert Biggerstaff hereby submits these reply comments in timely opposition to the Petition of Soundbite Communications, Inc., (“Petitioner”) for a declaratory ruling regarding “confirmation” text messages, pursuant to the Commission’s Public Notice DA 12-511.

In reading the Petition and the comments in support, I am reminded of the Lorrie Morgan song– *What Part of No Don't You Understand?* A request to “stop” means exactly that. Not “just one more” not “after the next one.” Stop. Now. Immediately. Unfortunately for consumers, the industry seems to be hearing Captain and Tennille, *Do It To Me One More Time*.

The Commission previously stated:

Given the potential costs and inconvenience to subscribers to receive such [commercial text messages], it is important that such messages be sent only to those wireless devices belonging to receptive subscribers.¹

“Stop” means the subscriber is no longer “receptive.”

In previous proceedings on the TCPA, telemarketers wanted to make a confirmatory call when someone made a do-not-call (“DNC”) request. The Commission did not succumb to that attempt to invade the privacy of the consumer who had already told the caller to stop. This Petition,

¹ *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003* ¶44 (2004) (NPRM).

and the comments supporting it, seek to reverse that sound reasoning and add the additional injuries that 1) some consumers are charged for each text message (or charged from an allocation of minutes or bytes); 2) cell phones are carried into places land lines are not thereby creating greater invasions of privacy; and 3) cell phone text messages are a threat to public safety when they distract drivers on the road.

In its prior TCPA Orders, the Commission also wisely declared that all marketers must abide by a consumer's DNC request as soon as possible. By definition, sending a STOP confirmation message is sending a message sent after the marketer has already received and processed the DNC request.

The fact that an industry association has cobbled together a list of voluntary standard practices for the industry, has no bearing on compliance with the law. The law is supposed to protect consumers from the industry, not the other way around. What if the industry standard was to send 3 confirmations? What if the industry standard was to discard DNC requests after 12 months? Voluntary industry practices should be treated as merely what an industry *wants*, and not in any way as a neutral or balanced proposal.

There is a major mental disconnect that pervades the industry comments on this docket. The industry seems to believe that the TCPA is only about "telemarketing" and that non-telemarketing calls are only being "unintentionally" swept up in the scope of the statute. But telemarketing regulation is only *part* of the TCPA's statutory scheme.² Another very important part of the TCPA is the restriction of "automated" devices regardless of whether the message is of a telemarketing nature or not. Another important aspect is the higher level of protection given to cell phones over

² The TCPA was created by combining two very different bills (S. 1462, 137 Cong. (1991) and S. 1410, 137 Cong. (1991)) shortly before passage. *See* 137 Cong. Rec. S18317 (daily ed. Nov. 26, 1991).

land lines. The TCPA simply is not and never has been merely regulation of “telemarketing.” Subsection “b” is titled “Restrictions on use of *automated* telephone equipment” and it means what it says. Notably, this section of the TCPA originated with S. 1462, 137 Cong. (1991) which was named “Automated Telephone Call Protection Act of 1991” and it’s language nowhere even mentions “telemarketing” as it applied equally to all forms of calls.³

Put Consumers First

If any credence should be given to the notion that a “confirmatory” message after the consumer says “stop” should be permitted, then the proper solution is to give the consumer choice. The message “STOP” should stop ALL communications, including any “confirmatory” messages. The message “CONFIRMSTOP” should be used when a consumer wants to stop, but also wants a confirmation message. And, of course, such a message must be cost-free and contain no solicitation, invitation, or reference to products goods or services. No subterfuge such as “sorry to see you go” or other felicitations. Indeed, if the Commission is going to permit such messages (hopefully only in response to a CONFIRMSTOP instruction) the Commission should take the essential step to mandate specific language for STOP confirmation messages, so as to proscribe the inevitable attempts to game the system by marketers.

For the foregoing reasons, the Petition should be DENIED.

³ See, e.g. 137 Cong., Rec. S9840 (daily ed. July 11, 1991) (Senator Hollings introducing the “Automated Telephone Call Protection Act of 1991).”